No. 11868

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THELMA TIPTON, MARY FOSTER, EVA C. WHITNEY, MARY F. DE BENEDETTI, CLARA OWENS TURNER, TRINIDAD MORA, DOROTHY MORA, DORA GRAJEDA, CONCHITA GRAJEDA, MARY TIBBITTS and GUSSIE BOURNE,

Appellants,

vs.

BEARL SPROTT COMPANY, INC., a corporation, BEARL SPROTT, individually and d/b/a BEARL SPROTT, DOE I, DOE II, DOE III,

Respondents.

BRIEF FOR APPELLANTS.

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Jurisdiction.

This is an appeal from an order and judgment of the District Court of the United States for the Southern District of California, Central Division, dismissing the third amended complaint of appellants, plaintiffs below, without leave to amend. The jurisdiction of this Court arises under Section 128 of the Judicial Code, as amended (Title 28 U. S. C., Sec. 225).

Preliminary Statement.

The action is one for overtime wages brought by appellants against their corporate employer under the provisions of Section 16(b) of the Fair Labor Standards Act (29 U. S. C. Section 216(b)). Originally filed on January 24, 1947, the complaint was amended from time to time

with appropriate leave. The present appeal is from the order and judgment of the District Court granting respondents' motion to dismiss the third amended complaint upon the ground that the appellants' employer, the principal respondent here, was not engaged in interstate commerce within the meaning of the Fair Labor Standards Act, and that appellants, under the allegations of the third amended complaint, were not engaged in any process or occupation necessary to the production of goods for interstate commerce within the meaning of Section 3(j) of that Act [Record pp. 9-10].

Upon this record the sole issue is whether the facts pleaded in the third amended complaint are sufficient to establish the jurisdiction of the trial court under the Fair Labor Standards Act.

Briefly, the complaint alleges that the respondent corporation owns and operates a cafeteria in the plant of the Columbia Steel Company at Torrance, California, where the latter is engaged in the manufacture and distribution of steel products in interstate commerce [R. pp. 2, 3]. It is alleged that the appellants were employees of the respondents during the period referred to in the complaint and were employed in various capacities in connection with the operation of respondents' cafeteria [R. pp. 3, 5]. The cafeteria, it is alleged, is operated twenty-four (24) hours per day under rules established by the steel company for the benefit of that company's employees. The steel company owns the building in which the cafeteria is housed and the greater part of the furnishings, utensils and equipment used by the respondents. It further regulates the cafeteria's hours of operation, menus and the prices charged for the food which it serves in order to meet the work schedules and convenience of the steel company's

employees, substantially all of whom patronize the cafeteria [R. p. 4]. In consideration of the right to maintain the cafeteria, respondents pay to the steel company five (5%) per cent of gross receipts from the operation. The cafeteria is open only to employees and business visitors of the steel company [R. pp. 4, 5].

The gravamen of the complaint is that during the period specified the respondents employed the appellants for work weeks of more than 40 hours and at all times failed and refused to compensate them for work in excess of 40 hours at 1½ times the regular rates at which appellants were employed, in violation of Section 7 of the Fair Labor Standards Act [R. p. 5]. Upon this showing the complaint seeks an accounting to determine the precise amounts due to each of the appellants and judgment in their favor in such amounts, together with liquidated damages, court costs and attorneys fees [R. p. 7].

Upon the respondents' motion to dismiss all these allegations of the third amended complaint must be taken as admitted.

Summary of Argument.

Appellants contend that the order and judgment of the District Court were in error and that the third amended complaint pleads facts sufficient to establish the jurisdiction of the Court under Section 16(b) of the Fair Labor Standards Act. The facts pleaded, it is submitted, show that appellants are engaged in occupations necessary to the production of steel products for interstate commerce. They negative, further, respondents' contention that appellants are engaged in a retail or service establishment the greater part of whose activities are in intrastate commerce within the meaning of Section 13(a)(2) of the Fair Labor Standards Act.

ARGUMENT.

I.

The Third Amended Complaint Pleads Facts Sufficient to Establish the Jurisdiction of the District Court.

A. Appellants Are Alleged to Be Engaged in Occupations Necessary to the Production of Goods for Commerce.

The decision of the United States Supreme Court in *Armour & Co. v. Wantock,* 326 U. S. 126, 89 L. Ed. 118 (1944), authoritatively clarified the meaning of Section 3(j) of the Fair Labor Standards Act, which draws the protection of that remedial statute over processes and occupations necessary to the production of goods for interstate commerce. In that case the court held that private auxiliary firemen employed primarily for the purpose of reducing the employer's fire insurance premiums were engaged in such occupations within the meaning of the Act. Giving to the statute the liberal construction required to effectuate its social objectives, the court rejected the narrow view that the process or occupation must be indispensable to the productive process. On the contrary, it is "necessary" within the Act if it contributes to the economy or continuity of production.

The same view sustained the jurisdiction of the federal courts in *Walton v. Southern Package Corporation,* 320 U. S. 540, 88 L. Ed. 298 (1944). There the services of the night watchman, employed both for plant protection and to reduce fire insurance premium rates, were held to be necessary since, as the Court stated, they constituted "a valuable contribution to the continuous production of respondents' goods."

These are the principles by which the pleading in the case at bar must be tested. Putting aside the fact that appellants were serving an employer other than the employer engaged in production for commerce, it is necessary only to determine whether their services make a "valuable contribution" to the production of steel at the plant in question. That they do so is manifest from the facts that the cafeteria is utilized by substantially all the production workers at the plant, that it is open to these workers twenty-four hours a day, that it is operated in such a way as to meet their needs as employees of the steel company and for their benefit rather than for the convenience of the public at large. Indeed, the mere circumstance that the steel company deems the operation of the cafeteria of sufficient importance to make space and equipment available and to exercise general supervision of it might, without more, be regarded as conclusive of the value attached to the services of the appellants by the producer himself.

Together, these considerations evidence participation by the appellants in the maintenance of continuous and efficient production to a degree and on a level considerably higher than that of the employees involved in the *Armour* and *Walton* cases. This Court may, if need be, notice judicially that the provision of adequate and convenient eating facilities contributes directly to the productivity of industrial workers, and far more substantially than does the employment of auxiliary firemen, watchmen or window cleaners.

Cf. A. B. Kirschbaum Co. v. Walling, 316 U. S. 517, 86 L. Ed. 1638 (1942).

It is of no importance that the in-plant cafeteria where the appellants are employed is not alleged to be the only

or even the principal eating facility in the vicinity of the plant.

Basik v. General Motors Corporation, 19 N. W. (2d) 142 (Mich., 1945);

Ferguson v. Prophet Co. (D. Ind., 1946), Home Cases 284.

As the cafeteria provides a valuable service, it makes no difference that comparable facilities exist elsewhere. The presence or absence of other eating facilities is merely one element to be considered in determining whether or not the services of employees furnishing the food are necessary.

Consolidated Timber Co. v. Womack, 132 F. (2d) 101 (C. C. A. 9, 1942);

Hanson v. Lagerstrom, 133 F. (2d) 120 (C. C. A. 8, 1943).

Appellants' employment by an independent contractor rather than by the producer who is himself engaged in commerce cannot affect the jurisdiction of the District Court. From the first, courts have recognized that whether employees are entitled to the benefits of the Fair Labor Standards Act depends not upon the business of their employer, but upon the relationship of their activities to the productive process. And the test of whether or not an occupation is "necessary" to the production of goods for commerce is substantially less exacting than the test of whether the employee or his employer is engaged "in commerce."

McCleod v. Threlkeld, 319 U. S. 491, 87 L. Ed. 1538 (1943).

Even if this were not the case, the facts pleaded here describe a relationship between the employer and the producer for commerce so integrated as to eliminate this question. Since the steel company has a vital stake in the operation of the cafeteria through its interest in the gross receipts, its ownership of the building and facilities and its supervision of the operation, it is immaterial that the appellants are not on its payroll.

Basik v. Gen. Motors Corp., supra.

The test is a practical one (*Armour & Co. v. Wantock, supra*). And by that test the appellants clearly can and do make a valuable contribution to the production of steel at the plant in question.

B. The Appellants Are Not Engaged in a Retail or Service Establishment.

While the District Court did not expressly pass upon the point the respondents have contended and no doubt will continue to contend that the appellants' employment is in a retail or service establishment and exempt under Section 13(a)(2) of the Fair Labor Standards Act.

This contention is sufficiently answered by the allegations of the third amended complaint that the cafeteria where appellants are employed is open only to employees and business visitors of the steel company. As such it is plainly not a retail establishment open to and maintained for the patronage of the general public as contemplated by the exemption. (*Walling v. Armstrong* (D. Mass., 1946), 68 F. Supp. 870; affd. (C. C. A. 1), 161 F. (2d) 515.)

Moreover, this exemption is to be narrowly construed and the burden rests upon the respondents to plead and prove facts showing that it is applicable.

A. H. Phillips, Inc. v. Walling, 324 U. S. 490, 89 L. Ed. 1095 (1945);

Consolidated Timber Co. v. Womack, supra.

Conclusion.

It follows that the third amended complaint alleges facts sufficient to establish the jurisdiction of the District Court, and to that extent, states on behalf of each of the appellants a claim upon which relief may be granted under the applicable statute.

Respectfully submitted,

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